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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 13

FEDERAL HOUSING ADMINISTRATION,
Appellant,

versus

THE DARLINGTON, INC.,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

MOTION TO DISMISS

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DECEMBER 27, 1957.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 628

FEDERAL HOUSING ADMINISTRATION,

Appellant,

versus

THE DARLINGTON, INC.,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

MOTION TO DISMISS

Pursuant to Rule 16 of this Court the Appellee moves the Court to dismiss the appeal herein on the ground:

> That the decision of the three judge district court did not declare Section 513 of the Housing Act of 1954 (68 Stat. 610) unconstitutional, and that therefore no direct appeal will lie to this Court as provided by 28 U.S.C. 1252.

Jurisdiction

This is a direct appeal from the decision of a three judge district court, and while the Jurisdictional Statement cites as authority for the direct appeal to this Court 28 U.S.C.

1253, a reference to that statute will show that direct appeals to this Court are limited to actions required by an Act of Congress specifically to be heard by a three judge court. Such is not the case here. The prior decision in this case by this Court (352 U.S. 977) will show that this Court sent the case back to be heard by a three judge district court on the grounds that this Court then considered a single district judge had declared an Act of Congress unconstitutional. If this Court has jurisdiction of this appeal it will have to come from a finding by this Court that the lower court has declared an Act of Congress unconstitutional, to-wit: Section 513 of the National Housing Act as amended (68 Stat. 610) 12 U.S.C. (Supp. IV) 1731.

Statutes Involved

The pertinent statutes, *viz.*, Sections 608 and 513 of the National Housing Act, as amended (56 Stat. 303, 12 U.S.C. 1743, and 68 Stat. 610, 12 U.S.C. (Supp. IV) 1731b), are set forth in Appendix D of the Jurisdictional Statement, pp. 54-59.

Questions Presented

> Does the Federal Housing Administration have any right to prohibit the rental for less than thirty days of vacant apartments in a building over which it has insured a mortgage prior to the Housing Act of 1954, when there is no demand for the said apartments by (a) veterans of World War II; (b) immediate families of veterans of World War II—the classes that the Housing Act required be given preference of occupancy?

Reference to Section 608 of the National Housing Act prior to the enactment of Section 513 of the Housing Act of 1954 will show that there were no specific requirements

of the act nor were there any rules and regulations or any contract documents that would have prohibited the owner of an apartment project, the mortgage over which was insured by the Federal Housing Administration, from renting apartments in the project for less than thirty days. This has been admitted by the Appellants, which admission was incorporated as a part of the decision of the court. This will be shown by reference to page 32 of the Jurisdictional Statement wherein it is set forth:

> "It is conceded by F.H.A. that, as of December 30, 1949, no specific provision of the charter, by-laws, mortgage, mortgage note, or any rule or regulation of F.H.A., restricted the right of plaintiff to lease apartments in its project for periods of less than thirty (30) days. In fact, the only period of limitation appears in the charter where it is said:
>
> "'Dwelling accommodations of the corporation shall not be rented for a period in excess of three years nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholders.'
>
> "It is significant that F.H.A. saw fit to impose a maximum rental period but overlooked what is now the partial subject of this controversy."

The Appellant did not attempt to prohibit rentals in the Appellee's apartment project for less than thirty days until after the passage of the Housing Act of 1954. We respectfully submit there is but one question presented in this appeal:

> Whether the wording of the Housing Act of 1954 is such as to apply the prohibition of the act to projects insured prior to the effective date of the said 1954 Act.

Any attempt on the part of the Appellant to claim that the Appellee under the terms of the acts, or rules and regulations of the Federal Housing Administration, or the contract documents in existence at the time the Appellant insured the mortgage over the Appellee's project, to-wit: December 30, 1950, was prohibited from renting apartments for less than thirty days, as the Court stated below, comes as an afterthought and is without any foundation whatsoever and we quote from the opinion of the court below (Page 44 of the Jurisdictional Statement):

> "In truth and in fact, the question now under consideration was never given a thought. In the desire of Congress to fulfill the need for housing, only such matters as the needs of war workers, veterans, families of veterans, and the customary soundness of the transaction from a financial standpoint with its attendant restrictions were the subject of legislation and intention."

Statement

Following World War II there developed the greatest housing crisis this nation has ever known. To meet the crisis Congress created Section 608, Title VI of the National Housing Act, the Veterans Emergency Rental Housing Act of 1946, emergency legislation intended to furnish rental housing for the returning veterans of World War II, or as stated in the caption of the Act:

> "To expedite the availability of housing for veterans of World War II by expediting the production and allocation of materials for housing purposes and by curbing excessive pricing of new housing, and for other purposes." (Public Law 388—79th Congress);

"* * * assist in relieving the acute shortage of housing which now exists and to increase the supply of housing accommodations available to veterans of World War II at prices within their reasonable ability to pay * * *";

And provided:

"Preference or priority of opportunity in the occupancy of the mortgaged property for veterans of World War II and their immmediate families * * * shall be provided under such regulations and procedures as may be prescribed by the Administrator."

Under the provisions of the Veterans Emergency Rental Housing Act, the Federal Housing Administration on December 30, 1949, insured the mortgage over a twelve-story apartment building that had been constructed by the Appellee Darlington, Inc. under the terms and provisions of the Veterans Emergency Rental Housing Act. Upon the completion of the building the demand for apartments in the building by veterans of World War II or their immediate families or others for thirty days or more was not sufficient to provide the funds necessary to make the monthly payments called for by the insured mortgage.

The Darlington, Inc., in an effort to secure the funds necessary to make the payments called for by the mortgage, adopted the policy of renting apartments in its building for less than thirty days. Although the Federal Housing Administration was well acquainted with and apprised of this fact for many years prior to 1954, no effort was made to prohibit The Darlington, Inc. from renting the apartments for less than thirty days until after the passage of the 1954 Act. We refer to the opinion of the court below:

"The subject (rental of apartments for less than thirty days) was thereafter brought to life by a letter of

F.H.A. to plaintiff dated January 4, 1955, which did not make reference to the Housing Act of 1954. In reply, Darlington made a fair disclosure of its operations as to furnished apartments and inquired as to what provisions of law or charter prohibited the renting of apartments for a period of less than thirty (30) days. Plaintiff's letter was referred to defendant's Deputy Assistant Commissioner who, in turn, then directed plaintiff's attention to the Housing Act of 1954. The present action followed this exchange of correspondence."

Upon the Appellant's threat to have the attorney general of the United States, under the provision of Paragraph (g) of the 1954 Act, prosecute The Darlington, Inc. unless it ceased the rental of apartments in its building for less than thirty days, this action was filed by Darlington, Inc. in the District Court for the Eastern District of South Carolina, asking the court to declare that The Darlington, Inc. had the right to rent apartments in its building for less than thirty days as long as there was no demand for the same by (a) veterans of World War II; (b) immediate families of veterans of World War II; (c) or others, for more than thirty days.

This case has had quite a history. District Judge Hoffman, before whom the matter was originally brought, felt that a decision in the case might possibly require a hearing by a three judge statutory court on the question of constitutionality of Section 513 of the Housing Act of 1954. Upon notification by Judge Hoffman, Chief Judge Parker of the Fourth Circuit Court of Appeals convened such a court and called for the submission of briefs by the parties. Upon reconsideration, the three judge court was dissolved and the case ordered heard by Judge Hoffman alone. After hearing the case in full, Judge Hoffman

(*The Darlington, Inc.* v. *Federal Housing Administration*, 142 F. Supp. 341) among other things, held that The Darlington, Inc., had a right to rent a reasonable number of its apartments for periods of less than thirty days "as long as priorities were maintained for the persons entitled thereto (veterans of World War II and their immediate families), and no proper person desiring occupancy for a period of thirty days or more is thereby precluded from obtaining accommodations." (Appendix B, p. 49, Jurisdictional Statement).

A direct appeal was taken from such judgment to this court under the authority of 28 U.S.C. 1252 on the ground that a single district judge had declared an Act of Congress unconstitutional. In a memorandum decision (*Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977) this court noted probable jurisdiction and remanded the case for consideration by a three judge district court. Accordingly, a new three judge district court was convened and upon consideration of the entire record, together with briefs and argument, the three judge court adopted as a part of its decision by reference the prior decision of Judge Hoffman and held that The Darlington, Inc. had the right to rent a reasonable number of its apartments for terms of less than thirty days and that the Federal Housing Administration had no right to prohibit such rental provided that no veteran of World War II, his immediate family or any other proper person be thereby precluded from obtaining unfurnished accommodations for terms of thirty days or more. Thereupon Appellant brought this direct appeal from such decision.

In the history of this Court, no doubt many absurd and ridiculous propositions have been brought before it, but we respectfully submit that in this appeal, presenting as it does an attempt on the part of the Federal Housing Ad-

ministration to prevent a mortgagor from renting vacant apartments to secure funds with which to pay the mortgage insured by the Federal Housing Administration, the Court has before it a situation where a government agency is willfully trying to force a company into insolvency with the inevitable result that such government agency will have to pay out the taxpayers' money in the form of mortgage insurance, the apartment project will have to be sold, at a loss to the government and to its owner, with the possibility that such project might be purchased and operated as an out-and-out hotel, the very thing that the Hotel Association sought to prevent by the enactment of Section 513 of the Housing Act of 1954. Should Appellant prevail, everyone will lose, including Appellee, Appellant and the Hotel Association, and common sense and justice will be relegated to a mockery.

In the words of Judge Hoffman (Appendix B, Jurisdictional Statement, pages 40 and 41):

> "The unusual situation created by reason of F.H.A.'s insistence to cease the practice of renting apartments for periods of less than thirty (30) days will admittedly necessitate the financial downfall of Darlington, with the resultant loss of an initial investment, together with the monthly payments of $6,222.79 each, beginning June 1, 1951, as well as a reserve account, etc. It certainly would not justify the continued existence of Darlington and bankruptcy would be the ultimate answer. A foreclosure of the mortgage would follow with the Commisionser of the F.H.A. acquiring title as it is a fair assumption that no purchaser at said sale would bid an amount equal to, or in excess of, the unpaid balance due on said mortgage. The mortgagee is obligated to acquire title under such circumstances and assign that title to the Commissioner who, in turn,

sells the property without regard to any limitations as to use, etc., unless, of course, F.H.A. insures a new mortgage on the project. The result is that a foreclosure is likely to bring about a hotel with its right to advertise and operate as such—the mortgagor would lose its investment—F.H.A. would undoubtedly be called upon to pay a substantial sum by reason of its insurance obligation to the mortgagee—and no one would profit."

Argument

At this point in this Motion we would like to invite the Court's attention to the statement of the lower court in its decision wherein it stated:

> "This is not a matter involving so-called windfall profits which became so prevalent under loose and questionable practices in the years following the termination of World War II. Plaintiff's sponsors caused land, valued at $125,000.00, to become a part of the project. It has been stated that the total cost of the building was $1,550,920.11 which, when added to the land value, makes a total project cost of $1,675,920.11. F.H.A. insured a mortgage to the extent of $1,357,700.00 thus leaving an investment of $318,220.11 on the part of the plaintiff."

At the outset we recognize that this Court by implication at least in its prior Memorandum Decision noting probable jurisdiction (*Federal Housing Administration* v. *Darlington*, 352 U.S. 977), took the view that the district judge had held an Act of Congress (Housing Act of 1954) repugnant to the Constitution, and therefore since the three judge court adopted the single judge's opinion, it could possibly be argued that the issue of whether the lower court has

declared the 1954 Act unconstitutional has already been determined by this Court.

We submit, however, that a careful reading of the original opinion by the single district judge, and the decision of the three judge district court, shows that the court below has not declared that the wording of the 1954 Act applied to projects insured before the effective date of said Act. We submit that the court below simply construed the Act and held that to attempt to apply the 1954 Act retroactively so as to prevent the rental of apartments in The Darlington, Inc.'s project for less than thirty days would be an unconstitutional application of the Act. We invite attention to the wording of the decisions of the court below:

> "We find no fault with the right of Congress to provide such limitations as to projects not committed at the time of the passage of the Act of 1954, or the power of the Commissioner under Section 513(c) of the Act of 1954 to impose such restrictions as a condition of a grant of an extension of the term of the insurance. *We merely hold that the Act of 1954 is not to be given a retroactive effect to previously committed projects except to the extent it is within the reach of the reserved power of regulation.*" (Opinion of three judge court, Appendix A, Jurisdictional Statement page 24.) (Emphasis added.)

We submit that a careful reading of the 1954 Act will show that Congress recognized that the act could not legally apply retroactively to projects over which the mortgage was insured or committed to be insured prior to the effective date of the Act.

At first glance Section 513 might convey the impression that all of its provisions are to apply to all mortgages insured under the National Housing Act, whether prior to or subsequent to the effective date of the Housing Act of

1954. A further reading of Section 513 (the full text of which is shown in Appendix D to Appellant's Jurisdictional Statement, pp. 55-59) indicates that the drafters recognized that any attempt to apply the provisions of Section 513 to mortgages insured prior to its enactment so as to affect the vested rights of mortgagors would be unconstitutional, and that the drafters of the Act limited the Commissioner under the terms thereof to the use of only "appropriate means" (see Paragraph "d") in carrying out the intent of Congress as expressed in the Act. The wording of the Act contains no command that the Commissioner shall apply the provisions of Paragraphs (f) and (g) of Section 513 as against mortgages insured prior to the effective date of the Housing Act of 1954.

The enactment clause of the Housing Act of 1954 states that "*this Act* may be cited as the Housing Act of 1954". (Emphasis added.). Section 513 (a) states that it has been the intent of Congress "since the enactment of the National Housing Act that housing built with the aid of mortgages insured under *that Act* is to be used *principally* for residential use; and that this intent excluded the use of such housing *for transient or hotel purposes*, etc. (emphasis added). Please note the reference to the National Housing Act as "*that Act*" and to the Housing Act of 1954 as "*this Act*".

Section 513 (b) provides that "no new, existing, or rehabilitated multi-family housing with respect to which a mortgage is insured under *this Act* shall be *operated for transient or hotel purposes* * * *". It is to be noted that the reference here is to mortgages insured under "*this Act*", to-wit: The Housing Act of 1954. The prohibition is against *operation for transient or hotel purposes*, not the mere renting of a few apartments for less than thirty days.

Section 513 (c) provides that no such mortgage shall be insured under "this Act" (the housing Act of 1954) ("ex-

cept pursuant to a commitment to insure issued prior to the effective date of the Housing Act of 1954") unless the mortgagor agrees not to rent "such housing or any part thereof, for transient or hotel purposes".

The exception of commitments issued prior to the effective date of the Housing Act of 1954 significantly indicates the intention to exclude not only projects the mortgages upon which were insured prior to enactment of the 1954 Act, but also those upon which mere commitments to insure had been issued prior to such date.

And Section 513 (d) provides in enforcing the expressed Congressional intention, the Commissioner is limited to the use of "appropriate means at his disposal". There is no direction in subsections (d), (f), (g), or (h) to apply the punitive provisions of subsections (f) and (j) to projects the mortgages upon which were insured prior to enactment of the Housing Act of 1954, but such sections specifically apply to mortgages insured after such date. As we analyze Section 513 of the Housing Act of 1954, there is nothing in the wording of the Act itself that gives the Act a retrospective application so as to affect or impair *prior vested rights*. The Act is simply declaratory of the intent of Congress and should be given retrospective operation as to such intent if in doing so, vested rights will not be impaired.

We believe, therefore, that it is clear from the wording of the Act and from its legislative history, that Congress did not intend the 1954 Act to operate retroactively so as to disturb rights that had become vested. Congress did intend to prohibit the use for *transient or hotel purposes* of projects to be insured in the future, and also to have the Commissioner prevent such use by projects insured in the past *where he could legally do so without destroying vested rights*. The legal presumptions are against reading a retroactive intent into a statute.

Moreover Appellee maintains that a careful reading of the decisions below (Appendix A and B Jurisdictional Statement) discloses that nowhere in either of said decisions of the District Court was Section 513 of the Housing Act of 1954 declared unconstitutional. After carefully considering the provisions of said Section 513, the District Court simply stated that the Housing Act of 1954 could not "be given a retroactive effect to previously committed projects except to the extent within the reach of the reserve power of regulation". (Appendix A Jurisdictional Statement page 24.) And the Court stated that an absolute prohibition as here applied against rentals for less than thirty days was not within such reserve power of regulation (Appendix A Jurisdictional Statement page 23).

Appellee respectfully submits that a careful reading of the decisions of the District Court will show that such decisions were based on contract provisions, statutes and rules and regulations in effect at the time Appellant insured the mortgage upon Appellee's project, to-wit: December 30, 1949.

In our view the decision of the lower court was to the effect that Section 513 of the Housing Act of 1954 was a proper and constitutional exercise of the right of Congress to declare its own intent but that such section does not apply to previously committed projects.

> "We find no fault with the right of Congress to provide such limitations as to projects not committed at the time of the passage of the Act of 1954, or the power of the Commissioner under Section 513 (c) of the Act of 1954 to impose such restrictions as a condition of a grant of an extension of the term of the insurance. *We merely hold that the Act of 1954 is not to be given a retroactive effect to previously committed projects except to the extent it is within the reach of the re-*

> *served power of regulation.*" (Opinion of three judge court Appendix A Jurisdictional Statement page 24.) (Emphasis added.)

As was stated by this Court in the case of *Crowell* v. *Benson*, 285 U.S. 22:

> "When the validity of an Act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. * * *"

We respectfully submit that the court below has in its decision adopted a construction of Section 513 of the Housing Act of 1954 which fairly avoids a declaration of unconstitutionality.

Conclusion

The attorneys for The Darlington, Inc., the Appellee herein, submit that this Court is without authority to hear this direct appeal from a three judge district court, in that the said three judge district court, in its opinion, merely construed the applicability of the Act in question, in reference to the facts presented in the case in which construction of the Act the Court merely held, and we quote from its decision:

> "We merely hold that the Act of 1954 is not to be given a retroactive effect to previously committed projects except to the extent it is within the reach of the reserved power of regulation." (page 24 Jurisdictional Statement.)

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